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IN THE

Supreme Court of the United States

October Term, 1957

No. 915

MICHELE DESSI,

Petitioner,

v.

PENNSYLVANIA RAILROAD COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should this court grant certiorari to consider an abstract proposition of law not suggested by the proofs at trial and not discussed in the opinions of the District Court and of the Court of Appeals.

2. Should this court grant certiorari where petitioner's sole argument to justify his petition rests upon his statement that the jury found a causal connection between defendant's negligence and plaintiff's injury, and

(a) The jury did not pass on the question (the trial judge held that his charge failed properly to submit it);

(b) Every witness at trial, including petitioner himself, agreed that the hypothetical occurrence upon

which petitioner's counsel now predicate causal connection did not in fact occur; and

(c) The District Court said there was "absolutely no evidence" to support causation, and the Circuit Court held that there was no evidence, "either circumstantial or direct tending to show that negligence of the defendant had any influence or effect in causing plaintiff's injury"?

STATEMENT OF THE CASE

Petitioner suffered a head injury while at work and brought this action under the F.E.L.A. to recover for the neurosis which he says resulted (74a).[1] Both the District Court (Eastern District of Pennsylvania) and the Circuit Court (Third Circuit—Chief Judge Biggs, Judge Goodrich and Judge Hastie) held that there was no evidence whatever to raise an issue on causation. Judgment was accordingly entered for defendant.

The sole basis for the petition for certiorari rests upon the assertion that Judge Hastie applied an erroneous rule of law in reaching the Circuit Court's decision. To decide whether any such rule, right or wrong, was applied does not require a detailed examination of the facts of the case. It requires no more than a reading of the opinion, and disposition of the petition should turn, therefore, upon what the opinion says. Nevertheless, we believe this court should be informed of the misleading aspects of petitioner's statement of the case. It contains the following inaccuracies and omissions:

1. "The jury, after ample instructions by the trial judge, rendered a verdict for petitioner" (Petition p. 3).

1. In this brief page references without a letter refer to the petition for certiorari and appendix thereto, i.e. (5). References with the letter "a" refer to the printed appendix used in the Circuit Court, i.e. (5a).

The District Court held that the charge on causation *did not* properly present that issue to the jury (143a). In fact the charge on causation was so inadequate that the trial judge said a new trial should be awarded (143a). However, no disposition of the motion for new trial was entered on the docket since judgment was entered for defendant (147a). On appeal the Circuit Court found it unnecessary to consider the trial judge's decision that he had *not* given "ample instructions" on the crucial causation problem (23a). Accordingly, defendant's motion for a new trial is outstanding.

2. "In that situation the entire weight of the car is on the jack" (Petition p. 3). That is untrue. The witnesses, including plaintiff, agreed that only one corner of the car body was being raised a few inches (9a, 10a, 23a, 37a—see opinion of Circuit Court, 21).

3. On pages 3-4 petitioner describes in light most favorable to the theory he advances the composition of some of the ground next to the paint track. He fails to point out that he is basing his description upon evidence which was disputed at trial (140a-141a), that there was no evidence that the *particular* spot involved was in fact soft, and that there was evidence that that particular spot was solid (97a).

4. " . . . the union representative had complained that the ground there was unsafe" (Petition p. 4). Those complaints pertained to heavy work on the paint track (117a). The particular job involved was light work (99a, 118a).

5. On page 4 petitioner argues that coupled cars should not be jacked, that there was a "safe or safer method" of performing the job in question and that "proper and adequate equipment was available" elsewhere. Judge Hastie disposed of this contention in his Circuit Court opinion (21), and nowhere in the petition is it suggested that his decision on that point is incorrect.

6. On page 5 petitioner says that the trial judge charged the jury that it should return a verdict for defendant if it found the accident was due solely to petitioner's improper operation of the jack. No such charge was given as reference to the page of the record cited by petitioner will show (131a).

7. "The jury . . . obviously did find that . . . the unsafe condition of the ground caused the jack to sink . . ." (Petition p. 5). The jury made no finding on this point (see paragraph No. 1 above). Petitioner himself, as well as each of the other witnesses, testified the jack did not sink (23a, 96a, 97a, 108a, 109a, 116a, 117a).

8. The last two paragraphs of petitioner's Statement of the Case are arguments. They are arguments based upon counsel's ingenuity, not on the record in this case.

ARGUMENT

1. Petitioner's Argument Concerning the Chamberlain Case Interjects a Theory Which is Inapplicable Here.

Petitioner chooses to ignore the present case and seeks to intrigue this Court by forecasting monstrous results which he says would flow if *his* interpretation of *Pennsylvania Railroad v. Chamberlain*, 288 U. S. 333 (1932), were applied by trial and appellate courts. But the rule petitioner evolves from the *Chamberlain* case was not applied in the present case by the courts below, and as a matter of fact petitioner has not cited a single case where any court has interpreted *Chamberlain* the way he has.[2] In F. E. L. A. cases today the courts apply, just as the district and circuit courts did in this case, the rule Mr. Justice

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2. The *Chamberlain* case does not stand for what petitioner says it does. Petitioner claims that *Chamberlain* holds that affirmative testimony must always prevail over circumstantial. What *Chamberlain* says is that where certain proved facts are consistent with equally plausible possibilities, it is not proper to say that one of the possibilities has been proved where "*positive* and otherwise *uncontradicted* testimony of *unimpeached* witnesses" (at p. 341, emphasis supplied) indicates that the possibility did not in fact exist. This is not the application of the broad rule petitioner gleans from the case. It is an extremely narrow rule, but it is clearly a rule of common sense and it has been applied consistently by the federal courts in all branches of litigation, e.g., *Smith v. Dunn*, 224 F. 2d 353, 357-8 (5th Cir. 1955). That the Third Circuit would apply no such rule as petitioner derives from *Chamberlain* is obvious from the decisions of that court in this field, decisions which consistently hold that even the slightest evidence of negligence or causation, whether direct or circumstantial, is for the jury. *Lukon v. Pennsylvania Railroad*, 131 F. 2d 327 (1942); *Beezer v. Baltimore & Ohio Railroad*, 203 F. 2d 954 (1953); *Thomas v. Concmaugh & Black Lick Railroad*, 234 F. 2d 429 (1956); *Widder v. New York, Chicago & Saint Louis Railroad*, 235 F. 2d 752 (1956); *Yentzer v. Pennsylvania Railroad*, 239 F. 2d 785 (1957); *Snyder v. Lehigh Valley Railroad*, 245 F. 2d 112 (1957); *Hoyt v. Central Railroad*, 243 F. 2d 840 (1957).

Brennan announced in *Rogers v. Missouri Pacific Railroad*, 352 U. S. 500 (1957).

Lest there be any mistake about respondent's position, we do not here challenge the general propositions which petitioner argues. Certainly if a case is proved by circumstantial evidence, that proof will not be wiped out by "affirmative" evidence produced by the other side. Certainly, in many instances, circumstantial evidence is as persuasive as direct evidence. But this case does not involve circumstantial evidence. Here both the trial judge and Judge Hastie for the Circuit Court held there was *no* evidence of causation. The trial judge said (141a):

> ". . . upon careful consideration I am satisfied that there is absolutely no evidence to show that plaintiff's injury resulted in whole or in part from any negligence of the defendant."

And again at 143a-144a, he said:

> ". . . there should be a judgment for the defendant notwithstanding the jury's verdict, by reason of the total lack of evidence to show any causal connection between defendant's alleged negligence and the plaintiff's injury."

The *Chamberlain* case is not even cited in the opinion. On appeal Judge Hastie made the Circuit Court's holding quite clear (23):

> "Accordingly, we hold that *the absence of evidence, either circumstantial or direct*, tending to show that negligence of the defendant had any influence or effect in causing plaintiff's injury, justified the entry of judgment notwithstanding the verdict in this case."

The *Chamberlain* case is not cited as authority for the holding which the court rests squarely on *Rogers* (21-22). At

one point in the opinion Judge Hastie did refer to *Chamberlain* but he preceded the citation with "Cf." (20).[3] He did not discuss the case, interpret it, or state what rule of law he would derive from it. We know only that the judges of the Third Circuit decided that *Chamberlain* was *not* controlling in the present situation but that it was worth comparing. We submit that it has required considerable intestinal fortitude for petitioner's counsel to tell this court that the court below "relied on", "applied", and "bottomed" the decision on *Chamberlain* (5, 8, 11, 12, 13).[4] Whether *Chamberlain* should or should not be overruled is a question which this Court may or may not choose to consider if it is properly presented for decision some time in the future. Clearly, that question is not presented by this case, for even if *Chamberlain* had been decided the other way, the present case would have been decided just as it was. A reading of the Circuit Court's opinion will show that.

By what, for the want of a better term, might be called "clever advocacy," petitioner has distorted Judge Hastie's thoughtful, able opinion into something it is not. What Judge Hastie termed "the absence of evidence" (23) petitioner calls his "circumstantial evidence". What Judge Hastie, in referring to the testimony of each of the wit-

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3. The Harvard Law Review Association, *A Uniform System of Citation* (9th Ed. 1955) explains "cf." as follows (p. 40):

> "'Cf.' is used before a case . . . expressing a legal proposition which, while only analogous, lends some support for the statement, conclusion or opinion of *law* in text . . . 'cf.' indicates that the material is related only by analogy and is simply to be compared therewith."

4. Some statements made in the petition as to the holding below are so contrary to what the Circuit Court did say that they seem to us to go beyond the limits of advocacy. These are examples:

> "The holding below that the jury is not free to draw a circumstantially supported inference . . ." (9).
>
> ". . . the rule of disappearing proof adopted by the court below . . ." (15).

nesses, including petitioner himself,[5] said was "all of the affirmative evidence on this point" (20) petitioner calls "respondent's affirmative testimony". Petitioner is thereby able to argue an illusion, that the Third Circuit allowed "respondent's affirmative testimony" to overcome petitioner's "circumstantial evidence".

If the reasoning process of petitioner's counsel were applied to one of this Court's recent opinions, *Herdman v. Pennsylvania Railroad*, 352 U. S. 518 (1957), it proves that Mr. Justice Brennan was wrong. In that case a train made an emergency stop to avoid hitting an automobile, and plaintiff, the conductor, was thrown in the caboose. The witnesses, plaintiff included, established those facts. This court through Mr. Justice Brennan said that "a jury question of negligence was not presented by the proofs" (at p. 520). According to petitioner's formula the decision was wrong. It is simply a matter of juggling terms. The fall in the caboose becomes "petitioner's affirmative testimony" (15). Since a sudden stop of a train *might* be due to negligent operation of an engine (just as a jack *might* sink into soft ground [6]), "petitioner's affirmative testimony" in turn creates "petitioner's circumstantial evidence" (14) of faulty operation, and all of this combined becomes "petitioner's proof" (16). The uncontradicted evidence that the stop was necessary to avoid striking an automobile becomes "respondent's affirmative testimony" (even though petitioner agreed it was true) which the jury, in exercising "its constitutional role as the judge of credibility and of ultimate truth" (15), could disbelieve. For this Court to

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5. Petitioner lifts out of context two sentences of Judge Hastie's opinion and seeks to disparage them (20). Judge Hastie there refers to petitioner's testimony as well as that of everyone else. We discuss petitioner's testimony in the second section of this brief.

6. And by the same token might *not*. The evidence here is that the kind of jacking operation involved can be safely performed even on a sandy beach if the jack is properly blocked (114a). Petitioner did the blocking in this case (23a).

have allowed "petitioner's proof" to be "obliterated" (16) by "respondent's affirmative testimony", and thus to cause "summary abolition of the right to prove a case by inference" (17), was a "massive invasion of the classic jury province" (17). That may be clever advocacy. Its helpfulness in the administration of justice is open to question. In the present case Judges Biggs, Goodrich and Hastie, exercised their experience and objectivity to determine that on this record plaintiff failed to produce any proof from which men "with reason" might conclude that the negligence complained of in any way caused or contributed to plaintiff's injury. Since petitioner does not question the Third Circuit's interpretation of *Rogers* and has been able to attack their collective judgment only by "clever advocacy" and not by pointing to any defect of substance, it is submitted that the petition should be denied.

2. There Was No Evidence Circumstantial or Direct Tending to Establish Causation.

In the District and Circuit Courts petitioner took the position that under *Rogers* he needed no evidence of causation. He argued that the jury could draw its own conclusions about causation quite irrespective of the proof, or the lack of it, on that point. For instance, he stated in the brief he filed with the Circuit Court:

> "Therefore, negligence having been established, the focal point of this appeal is causation. . . . And the Supreme Court of the United States has left no doubt that where negligence exists, it is for the jury alone, and not the court to determine its relation to the injury."

The Circuit Court, through Judge Hastie, recognized that under *Rogers* "the role of a defendant's negligence in helping bring about the injury may be small" (22), but concluded that this Court had not intended to eliminate the

necessity for some proof of a causal connection (21-22). Apparently petitioner is now ready to concede that Judge Hastie correctly analyzed Mr. Justice Brennan's opinion in *Rogers*, for the petition for certiorari abandons the early arguments, and petitioner now claims that he proved causation by "circumstantial evidence". Did he?

The theories of negligence advanced at trial by plaintiff's witnesses, his union claims representative and his divisional chairman, were afterthoughts which never appeared in the case prior to trial.[7] Although the trial judge thought that their testimony was incredible,[8] he ruled, and respondent of course agreed, that their testimony created jury issues as to negligence. Plaintiff claimed an unsafe place to work and unsafe procedures predicated on three things (130a-131a):

1. Approved procedure calls for a heavier jack or two or possibly three jacks;

2. It is not proper to jack a car coupled to other cars; and

3. The ground along the paint track was not as solid as elsewhere.

At no point in the petition is it explained to this Court how negligence #1 or negligence #2 might conceivably have caused a jack handle to fly up and hit plaintiff. Apparently

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7. The evidence of negligence brought out at trial was never mentioned during pre-trial discovery (21a-22a), was contrary to the pre-trial affidavit in which plaintiff said his injury was due to a defective jack (1b—appendix to this brief), and constituted a repudiation of the statement plaintiff gave the day of the accident in which he had said that the jack handle was out of the jack before the accident and said he had hit his head on the side of the freight car (21a, 125a, 139a). The union claims representative who developed the last-minute negligence theories admitted that as a witness he was "trying to explain to the jury any way [he could] how the company did something wrong" (42a).

8. He said (143a): "I am satisfied that it would be a miscarriage of justice to permit plaintiff to recover damages against the defendant on the evidence here presented."

petitioner concedes that Judge Hastie correctly decided that those claims of negligence had nothing to do with the accident, for there is no argument in the petition that there was "circumstantial evidence" that such negligence played any part, however small, in causing plaintiff to hit his head. Petitioner now argues that he proved that negligence #3 (soft ground) was the cause of the accident.[9] He concedes that this argument could have validity only if the jack sank into the ground and tilted (8, 15). Otherwise the movement of the jack handle—if it in fact moved on this day [10]—could not be related in any way to the consistency of the ground and would have to be attributed to some other cause wholly unrelated to the negligence claimed. For instance,

(a) Plaintiff might have failed properly to engage the safety dog (although considerably larger, the jack used was similar to the common ratchet-type automobile jack);

(b) Plaintiff might inadvertently have disengaged the holding pawl as he tried to take the jack handle out of jack (110a);

(c) Perhaps the locking dog was not "perfect". If not "perfect", the handle could come up (26a, 50a-51a);[11]

(d) Perhaps some foreign matter or an undiscovered defect in the jack caused it to operate improperly this one time (40a-41a).

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9. In the entire argument (pages 8 through 18 of the petition) petitioner mentions only the claim of negligence stemming from the condition of the ground. On page 5 of the petition the other claims of negligence are mentioned in passing, but petitioner does not try to demonstrate upon what facts a person "with reason" could determine that the "failure to uncouple the cars" or the "insufficiency of the jacking equipment" (which the circuit court held was not "insufficient" at all—21) could conceivably have had anything to do with this accident. Apparently he considers such points impossible to sustain.

10. See footnote 7, *supra*.

11. No liability could be predicated on this possibility (21).

As against these "no-liability" possibilities petitioner now argues that the circumstances show that the jack sank into the ground, tilted and became off-sprung. He makes that argument in spite of the fact that at trial he admitted, and every eye-witness agreed without equivocation, that the jack did not do any such thing. Plaintiff himself testified (23a):

> "Q. You placed the jack?
> A. Yes, sir.
> Q. And you put a block under it?
> A. Yes, sir.
> Q. You were satisfied that jack was on a solid spot?
> A. On top of the block and the ground could cave in.
> Q. The ground didn't cave in, did it?
> A. No, it didn't."

He also said that the jack held the car and completed the job (23a):

> "Q. And after you put the jack under it and started to jack it up, you got the jack up far enough the wedge would come out.
> A. Yes, sir.
> Q. And the jack was holding it up?
> A. Yes, sir."

Plaintiff performed the entire jacking operation. He started it and he finished it.[12] He said the jack did not sink into

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12. Petitioner does not mention this testimony either in the statement of the case or in the body of the argument. By a clever bit of sleight-of-hand his counsel attempt to remove this testimony from the case by saying in a footnote (fn. 2, p. 8) that it referred to a time "before the accident". Certainly it did, if "before" means a second before and if "accident" means the precise instant petitioner hit his head. What petitioner did see, did remember and did testify to *without equivocation* was that *he* placed the jack, that *he* jacked the car all the way up, and that *after* he had jacked the car the jack was still holding it up. If the jack were going to sink into soft ground, it would have had to do so during the time petitioner himself was right there operating it and observing it. He said it did not

the ground. Each of the other witnesses said the jack did not sink into the ground (96a, 97a, 108a, 109a, 116a 117a). There was no conflict in the evidence. All the witnesses, including plaintiff, agreed that the jack did not do what petitioner's counsel, and his counsel alone, now claim it did.

The courts within the Third Circuit, following the decisions of this Court,[13] recognize that juries are to be given great latitude in determining questions of causation in Federal Employers' Liability Act cases, *Rogers v. Missouri Pacific Railroad,* 352 U. S. 500 (1957); *Webb v. Illinois Central Railroad,* 352 U. S. 512 (1957). Indeed, they follow the admonition of this Court that speculation by the jury is permitted where the evidence gives rise to conflicting inferences and fair-minded men could reasonably draw different conclusions, *Rogers v. Missouri Pacific Railroad,* 352 U. S. 500, 507 (1957); *Lavender v. Kurn,* 327 U. S. 645, 653 (1946). They recognize that a jury may find for the plaintiff on the basis of purely circumstantial evidence, *Rogers v. Missouri Pacific Railroad,* 352 U. S. 500, 507 (1957). "Circumstantial evidence" may hold a slightly different meaning for each lawyer and judge. We submit, however, that the term does not include a guess contrary to what every witness, plaintiff's and defendant's alike, testified the truth really was. This Court has not yet held that jurors may ignore uncontradicted testimony from both parties and decide a case contrary to established fact. Clearly, the views of the district and circuit courts in this case were correct. Here there was *no* evidence, circumstantial or otherwise, which could "with reason" lead

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sink. His counsel is unable to advance an argument that Judge Hastie was wrong if the argument must take the *evidence* into account, so the crucial part is hidden in a brief footnote. Eleven pages of argument are constructed ignoring that it exists and pretending that petitioner's case and respondent's case conflicted on the crucial point.

13. The care with which the Third Circuit applies this court's rulings to give every protection to injured employes is demonstrated by *Hoyt v. Central Railroad,* 243 F. 2d 840, 842 (1957), in which all this court's recent decisions are analyzed and correctly applied.

fair-minded men to decide that petitioner's jack sank in the ground, tilted and was off-sprung. All the witnesses, petitioner included, agreed that it did not do that.

CONCLUSION.

The Circuit Court of Appeals for the Third Circuit disposed of this case in accordance with the doctrine of *Rogers v. Missouri Pacific Railroad,* 352 U. S. 500 (1957), and petitioner does not challenge the Circuit Court's interpretation of that case. The grounds upon which petitioner seeks a review in this court are theoretical only; they do not arise under the facts of this case and were not raised in the courts below. Therefore, the petition should be denied.

Furthermore, the decision of the Circuit Court that there was no evidence, either circumstantial or direct, tending to establish causation was a correct decision on the evidence presented.

Respectfully submitted,

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Attorneys for Respondent.

May, 1958

APPENDIX.

PLAINTIFF'S PRE-TRIAL AFFIDAVIT.

DONALD J. FARAGE, being duly sworn, deposes and says that:

1. He is of counsel for the plaintiff;

2. Plaintiff has brought an action under the Federal Employers Liability Act averring that he suffered injuries caused by a defective jack which he was using at the time the accident occurred, while in the course and scope of his employment, when the jack fell out and struck the plaintiff;

3. Obviously the condition of the jack is a most relevant and material issue in the case;

4. The jack is within the exclusive possession and control of the defendant;

5. At the time of the accident, and prior thereto, the plaintiff never had the occasion or opportunity to examine the inside parts of the said jack, in order to determine whether it was in good condition or was defective;

6. The plaintiff, by his attorneys, wishes to have the defendant produce the jack involved in this accident, for inspection by the plaintiff, his attorneys and by an expert of the plaintiff's choosing, it being understood that the defendant shall be privileged to be present at the time of such inspection or examination;

WHEREFORE, plaintiff files the attached Motion to compel defendant to produce said jack for such examination at a time and place mutually convenient to the parties.

DONALD J. FARAGE,
Of Counsel for Plaintiff.

Subscribed and Sworn to before me this 3rd day of December, 1954.

NANCY SHAW,
Notary Public.
NANCY SHAW
Notary Public, Philadelphia
Philadelphia County
My commission expires February 2, 1957.